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Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 ARTHUR USHERSON,

4 Plaintiff,

5 v.

19 Civ. 6368 JMF

6 BANDSHELL ARTIST MANAGEMENT,

7 Defendant.

8 -----x

9
10 November 14, 2019
11 4:00 p.m.

12
13 Before:

14 HON. JESSE M. FURMAN,

15 District Judge

16
17 APPEARANCES

18 LIEBOWITZ LAW FIRM, PLLC
19 Attorneys for plaintiff
20 BY: RICHARD LIEBOWITZ, Esq.
21 JAMES FREEMAN, Esq.
Of counsel

22 MCGUIRE WOODS, LLP
23 Attorneys for defendant
24 BY: BRAD RICHARD NEWBERG, Esq.
25 Of counsel

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1 (In Open Court)

2 (Case Called)

3 THE COURT: Good afternoon.

4 All right. So we're here for the initial pretrial
5 conference but, of course, there is also a pending motion for
6 sanctions, and this morning, at 12:20, Mr. Liebowitz filed a
7 letter response to that motion.

8 I am not going to consider it because it is not a
9 formal response. You are not permitted to file a letter in
10 response to a formal motion, so I'll disregard it until a
11 formal opposition is filed, but certainly it previews, I
12 suppose, what Mr. Liebowitz's arguments are going to be on that
13 score.

14 It seems to me there are some fundamental
15 disagreements about what happened, and I wonder if an
16 evidentiary hearing of some fashion should be held at which Mr.
17 Usherson should testify, perhaps others should testify, but I
18 don't know if, Mr. Newberg, you want to respond since you
19 filed --

20 MR. NEWBERG: Sure. I will be brief since obviously
21 there are a lot of facts in the motion. I don't want to take a
22 lot of the court's time.

23 I will say that in the case management letter, Mr.
24 Liebowitz said he would be fully responding to the motion by
25 the 13th, yesterday. So I considered this to be the response,

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1 but if your Honor wants to give him more time to actually
2 respond, so be it. Obviously, we welcome any evidentiary
3 hearing with Mr. Usherson to appear in person and my client to
4 appear in person.

5 One thing I will say about what was just explored and
6 this letter, we have obviously issues here with veracity, and
7 your Honor may or may not be aware of Judge Seibel's hearing.

8 THE COURT: I am well aware of it.

9 MR. NEWBERG: I won't go into it, but obviously it has
10 been referred to the grievance committee as well as fines and
11 contempt orders. So to get this letter which is substantively
12 so false on so many levels and demonstrative so from the
13 documentary evidence we presented to you is shocking, given a
14 few hours earlier promises were made to this Court, through
15 Judge Seibel, these sorts of representations, false
16 representations, would not be made again.

17 So I am happy to argue the motion, but obviously we'll
18 take the court's direction on that.

19 THE COURT: First of all, it is "Seibel," just for
20 your information.

21 MR. NEWBERG: I literally took that from the news
22 report that said how it was pronounced.

23 THE COURT: Don't always trust what you read.

24 Tell me more specifically what representations you
25 think are problematic, and Mr. Liebowitz, what is your

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1 response, which again is only informal at this point.

2 MR. NEWBERG: Sure. To say the mediation occurred is
3 an overstatement at most, where it says the mediation lasted 45
4 minutes. If one would say a ediation occurred, it lasted
5 approximately two minutes.

6 Mr. Liebowitz and his client were ordered to be there
7 in person. The mediation office reminded them. This Court
8 issued an order for them to appear in person at the mediation
9 under the rules. The Southern District of New York rules
10 specifically say the party and lead counsel need to be there.

11 That is another thing, he says there is nothing in the
12 court order or mediation order that says lead counsel needs to
13 attend the mediation. 9(c) specifically says lead counsel must
14 attend the mediation.

15 In terms of Mr. Usherson being on the phone and
16 actively participating the entire time, essentially we got
17 there. We were told by the mediator -- when I said I'll look
18 for Mr. Liebowitz in person, he said, "I just heard from Mr.
19 Liebowitz, he is not going to be here."

20 I said, "Well, will Mr. Usherson be here?" He said,
21 "I don't know. We'll see. I hope he will be."

22 And Mr. Freeman and Mr. Liebowitz's sister, neither of
23 which had made an appearance in this case, came to tell us
24 neither of those would be there. We said okay, I guess we
25 can't have the mediation. The mediator said we can't have the

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1 mediation.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 In fact, I was back at Penn Station just after 12:30.

10 The mediation was noon.

11 In terms of obtaining permission from the assigned

12 mediator was also false. Mr. Liebowitz asked the mediator can

13 we have a telephonic conference on the mediation? I said it

14 cannot be lawyers only, and eventually we agreed okay, if

15 everybody will participate by telephone.

16 This is back in late September, early October, he

17 asked the mediation office would that be okay. The mediation

18 office said in no uncertain terms no, that is not okay. Lead

19 counsel needs to be there in person, the parties need to be

20 there in person. If you want relief from that, go ask the

21 Court.

22 And when he asked the Court, the Court gave a full

23 month to conduct an in-person mediation with the parties and

24 under the rules which required lead counsel to be there. I

25 gave him various dates. He picked the very last date, October

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1 31, and I arrived with my client to find no Mr. Liebowitz, no
2 Mr. Usherson.

3 So to say that it lasted 45 minutes, to say Mr.
4 Usherson was on the phone the entire substance, to say
5 plaintiff obtained permission from the assigned mediator to say
6 nothing in this Court order or mediation rules say lead counsel
7 needs to be at the mediation, to say Mr. Freeman, who made no
8 appearance, and clearly asked me about the case, did not have
9 knowledge of the case, to say all of these things in this
10 letter, each one of those is specifically false.

11 The emails I attached to my motion, including the
12 receipts I attached, showed various timelines, showed continued
13 reminders Mr. Liebowitz and his client had to be there. Even
14 the documentary evidence shows many of these statements are
15 false. That is as brief as I can be. I apologize.

16 THE COURT: All right. Mr. Liebowitz? Mr. Freeman?

17 MR. LIEBOWITZ: Yes. I will represent to the Court
18 that James Freeman is my colleague who works in my law firm,
19 and he knows the facts of the cases that I filed, and he was
20 ready, fully prepared at the mediation. My sister that just
21 recently passed the Bar, she came as well and she's a member of
22 this Court as well.

23 THE COURT: She is admitted to this Court?

24 MR. LIEBOWITZ: Yes, she is admitted. Two lawyers
25 came that were familiar with the facts. I said to the

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1 mediator, according to the mediation rules -- and a lot of the
2 magistrates have this rule -- saying if they are a hundred
3 miles away from the courthouse, you can appear telephonically.
4 When I spoke to the mediator, he said yes. The reason for this
5 is because --

6 THE COURT: Mr. Liebowitz, I want to caution you that
7 you're already in a lot of hot water in this Court, and I think
8 you know that. In that regard, I would be very, very, very
9 careful about the representations you make to me.

10 If you prefer to let Mr. Freeman do the speaking, that
11 is one thing, although they are still representations on your
12 behalf. When did you advise [REDACTED] Mr. Usherson was not
13 going to appear in person?

14 MR. LIEBOWITZ: I don't know the exact date, but it
15 was before the mediation, and he said yes.

16 THE COURT: In what means did you do that?

17 MR. LIEBOWITZ: It was telephone.

18 THE COURT: And you personally advised him?

19 MR. LIEBOWITZ: I personally.

20 THE COURT: And he said that was okay?

21 MR. LIEBOWITZ: He said that was okay.

22 THE COURT: Is there a reason you didn't tell Mr.
23 Newberg that Mr. Usherson wasn't coming?

24 MR. LIEBOWITZ: I thought the mediator was going to
25 tell him he was going to appear telephonically. The rule says

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1 to let the mediator know. Whether or not the mediator told
2 him -- I worked with the mediator before, and this has never,
3 never, ever been an issue, and I believe he does help the other
4 side appear telephonically.

5 The reason for having this rule mediation rule in the
6 mediation program, I guess one of the purposes, you know, is
7 to, you know, limit the costs of the litigation.

8 Now, Mr. Freeman and Ms. Liebowitz attended the
9 mediation, were fully prepared, and Mr. Freeman can talk about,
10 because he was actually there, what happened. [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 THE COURT: You told me in the letter.

15 MR. LIEBOWITZ: [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 Mr. Freeman, I guess, can take it from there exactly
6 what happened, but --

7 THE COURT: All right. Mr. Freeman.

8 MR. FREEMAN: Yes. Thank your Honor.

9 In terms of my personal knowledge of this case, I
10 learned about the existence of the case at approximately 8:00
11 o'clock pm on October 30th, so it was the night before the
12 mediation. Mr. Liebowitz had indicated that there was a
13 settlement in principle regarding the price. There was an
14 actual settlement agreement that was being circulated, which I
15 did review.

16 I did review the complaint. I reviewed the exhibits
17 to the complaint. I reviewed the copyright registration, and I
18 also had email correspondence with Mr. Usherson the evening
19 before, and it was clear he was in Georgia.

20 So the next morning I arrived at 40 Foley Square
21 downstairs with Ms. Liebowitz, just recently admitted. We did
22 walk in. I had no knowledge one way or the other as to what
23 clearances were made in terms of telephonic appearances, but I
24 can attest to the Court, having personally participated in
25 dozens of mediations in this district, that the ordinary custom

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1 and practice is for the attorneys, particularly where the
2 plaintiff is out of state, for magistrate judges or mediators
3 to permit leave for the party to appear telephonically.

4 As far as I knew, the fact Mr. Usherson was not there
5 was nothing out of the ordinary. It was actually very routine
6 and very ordinary. When I did arrive, it was clear opposing
7 counsel was visibly upset, and he expressed his disdain that we
8 had appeared and not Mr. Liebowitz. He expressed disdain Mr.
9 Usherson wasn't there. There was about five to seven minutes
10 of back-and-forth about whether or not the mediation would
11 proceed. Mr. Newberg said it.

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 I was definitely there at least a half an hour if not
7 40 minutes. I don't know where he is getting two minutes from
8 when you count the administrative aspects and substantive
9 mediation. [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

THE COURT:

[REDACTED]

Mr. Newberg, do you care to respond, and we can decide how to proceed.

MR. NEWBERG: Yes, your Honor, I would like to respond. I stand by a lot of what I said here. I don't know where to begin. I will say that in terms of, as Mr. Liebowitz said, he never mentioned he would be there, Mr. Usherson would be there. Exhibit 8 to my motion is literally the night before communications between the mediator and myself about Mr. Usherson being there in person. He clearly at 10:03 pm the night before thought Mr. Usherson was going to be there in person, thought Mr. Liebowitz was going to be there in person at 10:03 the night before.

Whenever this phone call supposedly happened, maybe it is the phone call from six weeks earlier he then asked the mediation office and this Court to approve that was rejected,

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1 but [REDACTED] made clear he was not aware of this.

2 On the Exhibit 6, it is clear that I am asking let's
3 make sure he and Mr. Usherson can be there in person. Mr.
4 Freeman says all this time that took place. Again I refer the
5 Court to my receipts from Exhibit 12 that shows my change of my
6 train which I made in Penn Station and got an email receipt at
7 12:38 pm for this noon mediation.

8 This was not a case of we were there 45 minutes and
9 then somehow I went back in time to Penn Station and got this
10 receipt. There is even the next train available, 2:00 o'clock,
11 and even a receipt for my lunch in Penn Station a few minutes
12 later. I am not exactly sure what Mr. Freeman said, he
13 reviewed email from Mr. Usherson and he was clearly in Georgia.
14 I am not on any emails with Mr. Usherson.

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] I said clearly in
20 my email look, I'm leaving on an early morning train. If we
21 don't have a resolution, we'll all see each other in New York.
22 I got back revisions at 4:14 am on October 31st from Ms.
23 Liebowitz, which actually was 1:14 his time, since he was on
24 Los Angeles time.

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] That

10 was it. It was less than two minutes. I was back in Penn
11 Station.

12 I am not sure if there is anything else your Honor
13 thinks is strange or quizzical your Honor wants me to address,
14 I am happy to, but otherwise I will sit down.

15 THE COURT: How do you think I should proceed? Do you
16 think I should hold a hearing?

17 MR. NEWBERG: We are happy to have an evidentiary
18 proceeding with my client and Mr. Usherson here in person so
19 that they can discuss this. Right now what we have is Mr.
20 Liebowitz saying he would be responding to this motion by the
21 13th. I am not going to quibble over the 20 minutes, 12:20 in
22 the morning on the 14th, but I am happy to reply, frankly, to
23 his -- take this letter as his response, submit a reply and
24 have the Court, if the Court doesn't does want an evidentiary
25 hearing, to take the declarations that we have filed and file

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1 our reply and take his motion and decide the issue.

2 THE COURT: All right. So here is what I will do.

3 First, as I said, I am not going to consider the
4 informal response to a formal motion. I will give Mr.
5 Liebowitz until Monday of next week to file a formal opposition
6 in accordance with the local rules. I will give Mr. Newberg
7 until the following Monday to file a reply, including whatever
8 you think should be filed in support of the reply.

9 At the moment, I am leaning toward holding a hearing
10 to get to the bottom of this. There are some fundamental
11 disputes of fact that I think are relevant to whether Mr.
12 Liebowitz and his client complied with my orders in this case.
13 There is no question there was failure to comply with some of
14 them for sure.

15 But I am sufficiently concerned and sufficiently
16 skeptical of keeping -- I will keep an open mind, but I am not
17 willing to take counsel's representations for it, that I think
18 it might be necessary to have a hearing, presumably with Mr.
19 Usherson, presumably with Mr. Newberg's client, perhaps with
20 some or all of you testifying and perhaps with [REDACTED]
21 testifying.

22 One of you in your opposition and your reply address
23 whether you think a hearing is appropriate, and to the extent I
24 conclude a hearing is appropriate, tell me how you think that
25 hearing should be conducted, particularly if any or all of you

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1 needs to testify, how you think it should be handled. I will
2 issue an order that gives you further guidance on that front.

3 More broadly, I guess we are here for the initial
4 conference. One option would be to put everything on hold
5 pending adjudication of the sanctions motion and see where that
6 lands us. I will say I am skeptical of the request to dismiss
7 the complaint on that basis. I think if sanctions are
8 appropriate, monetary sanctions are presumably the way to go
9 and not dismissal, but so in part for that reason I guess my
10 inclination would not be to hit the pause button.

11 Another option would be to proceed with discovery in
12 the normal course. I guess the third option is somewhere
13 in-between. I wanted to raise this. Mr. Newberg has a
14 footnote in his memorandum of law, suggesting that there may be
15 a threshold issue with respect to the copyright in this case
16 that because it may predate 1989, that it is not a valid
17 copyright in the absence of a registration. I don't know if
18 you're right about that, and maybe you can elaborate on it.

19 Would that be dispositive of the claims in this case
20 and, if so, is that something we should have early summary
21 judgment motion practice on? What is your thought?

22 MR. NEWBERG: Thank you. Yes, that would be
23 dispositive. They lose all rights in copyright for publishing,
24 print out, listening, anything regarding your photograph
25 without notice if it was done before 1989.

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1 Additionally, actually just yesterday we also
2 discovered that after this case was filed, Mr. Usherson filed a
3 copyright registration, which it seems to be on these
4 photographs, so now it is unclear whether the registration in
5 the complaint actually does cover the photograph or if it is
6 the new copyright registration.

7 If it is the new copyright registration, it is
8 unequivocal this case must be dismissed with prejudice based on
9 the Supreme Court's recent holding in terms of having to have a
10 registration before you file and the Second Circuit and this
11 Court's holdings that that is a non-curable error.

12 So now we discovered that yesterday. One of the
13 things I was going to ask your Honor, I think we we need to
14 amend our answer. I do think that having discovery purely on
15 those aspects early would probably be a very good idea.

16 THE COURT: Mr. Liebowitz.

17 MR. LIEBOWITZ: Your Honor, so what defendant doesn't
18 realize is this is an unpublished work. The VA number is VAU.
19 When it is VAU, it is unpublished. So defendants say it was
20 published before 1989 is not accurate. So it was VAU, it is
21 unpublished, and that does not affect any public domain or
22 anything like that.

23 It was unpublished, so there is no issue with
24 registration. I don't know what defense counsel means about
25 other registrations or other photographs. I will have to see

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1 what my office did, but this is the correct registration. It
2 is registered as unpublished, and there are statutory damages
3 and attorney's fees in this case.

4 We believe that if defendant wants to take up these
5 issues during discovery, we want to have discovery as well. We
6 want to determine why wasn't there a license, why wasn't the
7 photograph taken down. There are a lot of factors that go into
8 statutory damages, and we believe that the appropriate thing to
9 do at this stage is to just set discovery, set the dates, and
10 let the parties engage and hopefully during that process the
11 parties could eventually get to a settlement number we are
12 willing to live with and we can finally put this matter to
13 rest.

14 MR. NEWBERG: May I respond briefly, your Honor?

15 THE COURT: Sure.

16 MR. NEWBERG: Responding backwards on the point of the
17 facts on the discovery Mr. Liebowitz is talking about, that is
18 normal discovery. What we are talking about --

19 THE COURT: Slow down.

20 MR. NEWBERG: -- is preemptive discovery on the notice
21 on registration. I can tell Mr. Liebowitz right here on
22 August -- this is a photo, sort of well known folk community
23 photo of Bob Dylan, Leon Redbone and David Bromberg at the
24 Mariposa Folk Festival on July 16, 1972.

25 Taking this backwards, while there is a registration

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1 that was mentioned in the complaint that simply just says
2 unpublished photographs, Nos. 122-208, that is what was for the
3 complaint. On August 22nd, a very specific registration was
4 issued that says Arthur Usherson, Bob Dylan at Mariposa Folk
5 Festival, July 16, 1972, 30 photographs. Clearly it is very
6 likely one of these 30 photographs is the photograph in
7 question, which is a photograph of Bob Dylan at the Mariposa
8 Folk Festival, July 16, 1972.

9 As far as the publication, I am well aware the
10 registration says that they're unpublished photographs. I
11 think that is almost certainly inaccurate. This is a
12 photograph that has been widely circulated. I found examples
13 of it ranging back 10 to 20 years, and so if it were
14 unpublished, it would, it would be widely circulated, which may
15 be another reason to take discovery. Thank you.

16 THE COURT: If there is a generic registration on day
17 one, and then a more specific registration on day two, I don't
18 know why that would, be but in theory cover the same work?.

19 MR. NEWBERG: It is possible then it could cover the
20 same work. We are willing to find out whether these
21 unpublished photographs are composite copies to determine
22 whether or not this is part of it and why there was this new
23 registration.

24 In addition, if you published hundreds or a group of
25 unpublished photographs, a collection, if any of those

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1 photographs, and -- this may be the reason for the new
2 registration -- if any of those photographs actually were
3 published, that takes away the entire copyright registration.
4 So I have 50 unpublished photographs and 10 published, and to
5 put them in as unpublished photographs and try to get them in
6 that way and determine some of them were published, then that
7 copyright is no longer valid.

8 THE COURT: What do you need to get to the bottom of
9 that and figure out what is going on here?

10 MR. NEWBERG: In terms of discovery, we need discovery
11 on deposit copies of the photographs were put in for this 2011
12 registration. We need discovery on Mr. Usherson of when these
13 photographs were published, if they were published, and if they
14 have, how they have been used, and discovery of why this new
15 registration was put in on August 22nd, because if the new
16 registration was essentially the first valid registration for
17 this photograph, then this case is -- and that is a separate
18 issue obviously from the notice, which is another reason for
19 dismissing.

20 If it were found, that is the other part of discovery,
21 if this is a published photograph and it was published without
22 notice prior to 1989, then there is no copyright possibility
23 whatsoever.

24 THE COURT: What discovery would you need on that
25 aside from the deposition of Mr. Usherson?

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1 MR. NEWBERG: We need the deposition, obviously, the
2 documents in his possession regarding how this photo has been
3 used, licensed, published, distributed in the past.

4 THE COURT: I guess my concern with the idea I floated
5 of having limited and early summary judgment: A, it sounds a
6 little messier than I had hoped; and, B, it sounds like the
7 discovery you would need is not so different from the discovery
8 that would be taken if the case were proceeding in the normal
9 course. All right, guys.

10 MR. NEWBERG: On Mr. Usherson, it would be similar.

11 We have a deposition on discovery, but on Mr.
12 Usherson, that would be encompassed. I would say maybe half of
13 the discovery we need on Mr. Usherson. Of course, none of that
14 is needed on our side. So it is possible it cuts out
15 three-quarters, but certainly there is a large amount.

16 THE COURT: What else do you need aside from that if
17 the case were to proceed in the normal course?

18 MR. NEWBERG: In the normal course, what we need is
19 things like Mr. Usherson's licensing history, if there was any.
20 Obviously, it has been said so far he never licensed this in
21 the past. We want to obviously delve into that, and we want to
22 go through the creation of it, obviously establish he is
23 actually the author of this photograph, and so those are the
24 main points. I would have to give it some thought additionally
25 what we want from plaintiffs.

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1 THE COURT: Mr. Liebowitz.

2 MR. LIEBOWITZ: Your Honor, I don't think early
3 summary judgment is appropriate. It is all these issues of
4 obviously photographers, they take a lot of photographs of the
5 same subject matter all the time. Just because he's
6 registering and having another registration with a name, the
7 same event, why he is drawing so many conclusions from that,
8 but photographers do that all the time to get more photographs
9 registered.

10 I think there is a lot of discovery issues that need
11 to happen on both ends, and I think simply going along with
12 what the parties propose as a discovery plan should be the
13 right approach to continue the case, doing briefing at the end
14 of discovery.

15 THE COURT: Talk to me about the merits. Is it the
16 case that defendant took or Mr. Bromberg took a picture from
17 Mr. Redbone's Facebook profile and simply posted it? It says,
18 "Rest in peace." Is that the gravamen?

19 MR. LIEBOWITZ: Yes. This is straightforward. We
20 believe liability is there. They used the photograph. They're
21 not disputing it.

22 THE COURT: Did they gain anything from it?

23 MR. LIEBOWITZ: They're using it, the management
24 company is using it on their Facebook page. We have had to
25 find out during discovery what was the purpose.

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1 Now, you know, whether or not they made money off of
2 it, you know, I don't think is, you know, such, you know -- it
3 may be one factor of a defense, but the only two factors you
4 need is it is registered with the copyright office and they
5 copied the photograph. Now, I don't believe defendants are
6 disputing that they copied the photograph, and I think
7 ultimately this is a case regarding damages.

8 What is the appropriate statutory damages for an
9 iconic photograph of singer-songwriter Leon Redbone?

10 THE COURT: A photograph that never before had been
11 licensed?

12 MR. LIEBOWITZ: Yes. Just because it wasn't licensed
13 before doesn't mean that he's not entitled to a licensing fee.

14 THE COURT: Doesn't the licensing history factor
15 heavily into what the appropriate licensing fee brings,
16 statutory damages would be?

17 MR. LIEBOWITZ: Yes. That is the reason for statutory
18 damages. If the statutory damages exist because if there is no
19 actual damages because here if there is no licensing, then the
20 Courts would look at okay, the range is between 750 and
21 150,000, where in the spectrum it should be. That is the
22 purpose of the statutory damages. Not only if there is no
23 actual damages, what about deterrence? Is defendant going to
24 keep on using the photographs without permission?

25 What about, you know, a license? What about photo

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1 credit? There has to be some deterrence because they will
2 continue to do it. I strongly believe that is the reason for
3 statutory damages.

4 Here if there is no licensing fee, we are going to
5 have other factors going to statutory damages like the
6 willfulness. Why license? We want to find out a history of
7 other licenses from the defendant, how they licensed
8 photographs of other people before and what they charged for
9 that amount. I think this case comes down to damages, and we
10 need to determine all of these things during discovery to find
11 out what an appropriate number is.

12 THE COURT: Well, I don't know if it comes down to
13 damages or not, but maybe a fair use argument as well. If it
14 does come down to damages, I must say it is not clear to me
15 that it would lead to anything short of the low end of the
16 statutory damages award, which makes me think discovery
17 shouldn't be the tail that wags the dog in this case.

18 MR. LIEBOWITZ: Your Honor, at the mediation and say
19 zero dollars. You know, it is worth something. The statute
20 has a minimum of 750 to 150,000.

21 THE COURT: Mr. Liebowitz, do you think you're getting
22 150,000?

23 MR. LIEBOWITZ: No, no, your Honor.

24 All I am saying is at the mediation when they offered
25 zero dollars, that's bad faith. We were negotiating a

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1 settlement. We got a number the day before. This case should
2 have been done weeks ago, and we tried to resolve the matter
3 without coming here today, and we tried doing that, but the
4 defendants take the position that they're trolling for
5 sanctions, trying to make money off of this, and we are open to
6 settlement, the same number we discussed before the mediation.
7 If they didn't agree to the terms, we could have worked it out.

8 I am still hopeful and truly hope that defendant, in
9 good faith after this, we can go outside and try to discuss a
10 resolution so that we could resolve the case and move on.

11 THE COURT: All right. Even if you resolve the case,
12 as you know full well, with your history with me, that doesn't
13 necessarily resolve the sanctions if I decide to proceed with
14 that. Be that as it may, my inclination is given the amount in
15 controversy or likely to be in controversy here, we should
16 severely limit the discovery, and I wonder if you need, either
17 side needs more than one deposition.

18 Your positions on that?

19 MR. LIEBOWITZ: I believe that whoever posted the
20 photograph, if it was more than one person, we need to get one
21 or two people and then defendant's corporate representative.

22 THE COURT: Mr. Newberg?

23 MR. NEWBERG: The person involved, it is the same as
24 our corporate representative. So it would be the individual,
25 30 (b)(6), the same day. I do not know at this point that we

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1 need beyond Mr. Usherson. No pun intended, I don't want to
2 make a federal case out of this, depositions would be taken of
3 other people who have been posting this and using this over the
4 years, but I'm not likely to do that. So I would say that's
5 probably accurate.

6 I would like to briefly respond to the merits portion,
7 but if you would rather me not?

8 THE COURT: You can briefly, but I do want to move on
9 and bring this to a close.

10 MR. NEWBERG: Sure. Which is going to lead to one
11 open issue, which is on the merits issue, we think this is
12 pretty quintessential fair use. This was a Bromberg page.
13 Dave Bromberg is an older gentleman, so he has someone who
14 administers his page, and that is the defendant here. It is
15 not common commercial use, literally one of his good friends
16 who has a cropped version of the photograph, not even the full
17 portion.

18 THE COURT: Why don't you use that microphone. It
19 would be better and closer to you.

20 MR. NEWBERG: With no copyright notice on it
21 whatsoever. It hasn't been licensed, ever. There is no market
22 for it. There hasn't been a market. No market was affected,
23 no market will be affected. It was simply literally a, "Rest
24 in Peace" message to Leon Redbone. Leon Redbone's profile
25 picture, it wasn't one of his pictures and his photos. It was

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1 just showing his profile picture. It clearly wasn't used for
2 creative purpose. Every single one of the factors for fair use
3 lines up.

4 The other thing that I would say is in terms of the
5 value, I mean they keep going to this zero offer. We had
6 gotten offers from them 25 and 24, 10, 5, 2, 1200, et cetera.
7 We had made an offer of judgment in this case which got ignored
8 which is more than the statutory minimum. So in addition to
9 fair use, we believe that we've got a good argument to have
10 costs and fees under Rule 68, and so one open issue I did want
11 to bring up is defendant does plan on moving for a bond to
12 continue with this case. We think we have a very strong
13 argument.

14 THE COURT: When do you plan to bring that motion?

15 MR. NEWBERG: I can bring it within the next two
16 weeks.

17 THE COURT: All right. Why don't you file it within
18 the next two weeks. Mr. Liebowitz can respond two weeks
19 thereafter, and you can reply a week thereafter.

20 I am going to limit discovery. I am not going to
21 limit discovery substantively. I am persuaded that there is no
22 reason to do that here, that it wouldn't lead too much to an
23 efficiency game. However, given what I sense is the amount in
24 controversy, and my discretion under Rule 26 with respect to
25 ensuring discovery is proportional to the case, I am going to

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1 limit depositions to one per side.

2 If you want to take more than that, you are going to
3 need to seek leave of me and explain why it is necessary. The
4 one is premised on the assumption the person who posted the
5 photograph and 30 (b)(6) are one and the same person, so I when
6 I say "one," it is a combined individual and corporate
7 depositions. So I want to be clear about that. If that proves
8 not to be the case, then I would not limit it to one, and
9 plaintiff could take two of the defendants, the person who
10 posted it and the corporate representative.

11 I will in light of that set a deadline for the
12 completion of discovery, and also you need the time you
13 proposed, and instead I'll give you until January 31st of next
14 year to complete discovery. Then I will have you back the week
15 after that, namely, on February 6th, at 3:30 in the afternoon,
16 at which point we will see where things stand and what motions
17 you would anticipate filing and the like.

18 I may well see you before that. If I do decide to
19 hold an evidentiary hearing in connection with the sanctions
20 motion, I have already given you your briefing schedule on
21 that, and I will remind you in your opposition and reply, you
22 should address whether a hearing should be held and, if so,
23 what it would look like and how we should proceed depending on
24 who the witnesses should be, and you should discuss who should
25 be called as a witness.

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1 A couple of quick comments, reminders. Mr. Liebowitz
2 has heard this before, but first, that January 31st deadline is
3 a fixed and firm deadline. You should not assume you will get
4 more time for discovery than that. There is obviously no
5 expert discovery to be had here, so that is the end of
6 discovery.

7 The interim discovery deadline set forth in Paragraph
8 9 are subject to change by written agreement between you. It
9 does need to be in writing. You do need my permission
10 otherwise. However, that January 31 deadline is one I am
11 setting, and do not assume you will get more time.

12 If you have an application on that front, it better be
13 in writing, and better be filed on ECF, and better be filed as
14 a letter motion, and better be filed before January 31, and you
15 better have a good argument why additional time is needed in
16 that regard. Don't assume it will be granted.

17 If there are discovery disputes along the way, you're
18 required to confer with one another in an effort to resolve
19 them in good faith. I would strongly urge you to have a
20 written record of this communication. Hopefully you can sort
21 things out nonetheless. If you can't, then either side can
22 file a letter motion, not to exceed three pages, seeking
23 discovery under Rule 37.2 conference, and the other side has
24 three business days in which to respond, and I will resolve the
25 issue promptly by written order or by some form of conference.

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1 Try to work it out. If you can't work it out, there
2 is a process in place to work it out for you, and you better
3 avail yourself of it in a timely fashion. Otherwise, you will
4 not get whatever it is you think you're entitled to or
5 additional time, either.

6 That I think resolves all I needed to accomplish
7 today. I will obviously be looking and reading with care
8 whatever you file on both the sanctions issue and the bond
9 issue. Is there anything else that you need to address today?

10 MR. LIEBOWITZ: Nothing, your Honor. Thank you.

11 MR. NEWBERG: One question, I mentioned leave to amend
12 the notice and registration issues. I respectfully ask for
13 that.

14 THE COURT: When would you be able to do that?

15 MR. NEWBERG: Any day next week would be fine. It is
16 very limited.

17 THE COURT: I will give you until next Friday to file
18 an amended answer. Anything else?

19 MR. NEWBERG: No, your Honor.

20 THE COURT: We are adjourned. Thank you.

21 (Court adjourned)
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23
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25